#2014-009

To: Subcommittee on Amendments to the Rules of Civil Procedure
From: David Slawsky
Date: 12/06/16
RE: Relation back

This memo offers my thoughts and recommendations about a New Hampshire Superior Court rule that addresses the relation back doctrine. Considering the various models available (primarily Fed.R.Civ.P. 15(c) and Mass.Civ.P. Rule 15(c)), and the recommendation in Judge Delker's thoughtful memo, I suggest an alternative formulation for your consideration. My proposal and the reasons in favor are set forth below.

Superior Court Rule 8(c). Relation back.

An amendment to a pleading relates back to the date of the original filing:

(1) (Claims and Defenses) when a claim or defense that arose out of the conduct, transaction, or occurrence in the original Complaint and Answer is amended, unless relating the amendment back to the date of the original filing will serve to significantly prejudice any party, or

(2) (New Parties) when a new party is added to the case, unless relating the claims against a new party back to the date of the original filing will serve to significantly prejudice any party, considering the following: (a) when the new party received notice of the claim, (b) whether the new party knew or should have known that the action would have been brought against it but for a mistake concerning the proper party's identity, and (c) what impact a ruling on the relation back issue will have on resolution of the merits of the case.

My reasons for this recommendation:

1. New Hampshire has wisely avoided adoption of rules like Fed.R.CivP. 15(c) that substitute an analysis of multiple "unequivocal" elements to limit the discretion of the Superior Court

Unlike most other jurisdictions, New Hampshire has a long and storied history of avoiding adoption of the federal rules of civil procedure. Certainly a strong argument can be made that the rules that are followed in all federal courts and many state jurisdictions should be followed here as well. Yet, not long ago, a significant portion of the bench and bar rejected that argument after more than a decade of study. *In re Proposed Rules of Civil Procedure*, 139 N.H. 512 (1995).

New Hampshire courts have long emphasized the central point that our rules exist for only one reason: to allow for the fair adjudication of the merits of a dispute. Perhaps my view of the importance of this issue is colored by too many hours doing battle in federal court with brilliant

attorneys from other jurisdictions (and from our own) who creatively spin webs from nuances located in "clear and unequivocal" federal rules.

Fed.R.Civ.P. Rule 15(c) is a good example of the problem as illustrated in one of the leading recent opinions - *Schiavone v. Fortune*, 106 S.Ct. 2379 (1986). In that case, plaintiffs filed suit in federal court on May 9, 1983, instituting libel actions naming "Fortune" as the sole defendant (alleging that the magazine libeled each plaintiff in a published article). The applicable statute of limitation expired 10 days later (May 19, 1983). What the plaintiff did not realize when suit was initiated was that "Fortune" was only a trademark - the name of an internal division of Time, Inc. After Time's agent refused service, the plaintiff amended the Complaint to name "Fortune, also known as Time, Incorporated" and served the Complaint on July 21, 1983. The district court granted the motion to dismiss, holding that the New Jersey statute of limitation barred the action. The Third Circuit Court of Appeals affirmed, characterizing the language of Rule 15(c) as "clear and unequivocal." The Supreme Court affirmed - but in a divided opinion. Justice Stevens, in dissent, argued that (1) a plaintiff has 120 days to make service from the original filing, so there was no practical reason to find that the case was not timely initiated, (2) there was no evidence that Time was prejudiced by the amendment, (3) the amendment did not "change a party" against whom the claim was asserted, and (4) the "liberalizing purpose" of Rule 15(c) would be circumvented if a construction of the rule effectively limits application of the relation back rule. Nevertheless, Time, Inc. was given a pass on this one.

2. <u>The better rule would provide clarity</u>.

I would be in favor of adopting Rule15(c), Fed.R.Civ.P. if it provided clear guidance about how to resolve relation back issues. The federal rule clearly allows the relation back of amended claims and defenses. Rule 15(c)(1)(B).

But there is significant confusion over the proper way to treat the issue with respect to the addition of new parties. The circuit courts are divided in three different ways about how to properly resolve these issues. *See generally* Zeiger, *A Change to Relation Back*, 18:2 Texas Journal on Civil Liberties & Civil Rights, 181 (2013)(offering a resolution to the current split of authority on "John Doe" complaints). As noted in the Zeiger article, eight federal circuits hold that a lack of knowledge resulting in a "John Doe" complaint is not a mistake, and therefore, an amendment to the caption cannot relate back to the date of the original complaint. The Third Circuit considers that the amendment of a "John Doe" complaint is a mistake that relates back. The Fourth Circuit previously held that a lack of knowledge of a party's identity is not a mistake, but more recently decided that an amendment to the identity of "John Doe" defendants may relate back, as long as the notice to the added defendant is sufficient and there is no prejudice to the defendant. *See also General Linen Service, Inc. v. General Linen Service Co.*, 12-cv-111-LM, Opinion No. 2015 DNH 21 (D.N.H. 2015)(applying the complex Rule 15(c) analysis involved in rejecting plaintiff's motion to amend a claim to add as defendants individuals employed by the defendant company after expiration of the statute of limitation).

3. For almost 200 years, the New Hampshire Supreme Court has vested a ruling on the relation back issue in the discretion of the Superior Court; more recently the Supreme Court has explained in two unreported opinions that whether the addition of a new party relates back depends on whether that party received timely actual notice of the lawsuit.

A review of many of the central New Hampshire decisions in this area indicates a consistent recognition that these are areas uniquely within the discretion of the Superior Court. Summaries of some of the key decisions follow:

Whittier v. Varney, 10 NH 291(1839). Creditor sues debtor, seeking conveyance of property, and learns, shortly before trial, that debtor has conveyed property (for no consideration) to a third party under circumstances indicating fraudulent collusion. Verdict for the plaintiff. Affirmed on appeal. **"It seems to be the very nature of an amendment that, when made, it should relate back. The court cannot authorize the manufacture of a new writ, or a new judgment, or return, at the subsequent date."** "Where the justice of the case requires it, amendments may be made, saving the rights of third persons acquired prior to the making of the amendment. And they may be allowed on the terms that all the costs of an action up to that time shall be paid. In some cases no amendment ought to be allowed but upon such terms."

Thorndike v. Collins, 68 NH 46 (1894). Statute required signatures or 20 petitioners. Turned out that only 19 of the petitioners were qualified. "Was the defect amendable? There is nothing in the nature of this action that excludes it from the operation of the general rule authorizing the court to allow amendments to be made in civil actions by adding new parties, or substituting new ones for original parties, if justice requires the change to be made. The requirement that there shall be 20 petitioners, who shall be legal voters in the town where the alleged nuisance exists, was designed to prevent frivolous and vexatious suits. So many persons of mature age, having an opportunity to learn whether a nuisance exists, by a residence in the vicinity for six months at least are not likely to join in a petition unless there is reasonable cause for instituting the proceeding. As a guaranty of the necessity and good faith of the suit, the petition of such persons may well be regarded as equivalent to an information filed by the solicitor of the county. The object of the requirement is not defeated by substituting a qualified person for one not qualified. **The substitute will not become a party unless he approves of the proceeding. Moreover, in legal effect, he becomes a petitioner from the beginning of the action.** *Whittier v. Varney*, 10 N.H. 291, 302, 303 (1839). Whether justice required that the amendment should be made is a question of fact, that is not reviewable here. Exceptions overruled."

Blanchard v. American Realty, 79 N.H. 295 (1919). Pleas of assumpsit to recover an installment of $25,000 under logging contract. Contract for $100,000 to be paid in 4 equal installments. Case was tried under the amended declaration - the original counts were stricken and the new counts substituted. Plaintiff prevails. Affirmed on appeal: **"the amendment was made which related back to the date of the writ."**

Lewis v. Hines, 81 N.H. 24 (1923). Intestates were killed at a grade crossing in Nashua. The writs name "Walker D. Hines, Director General of Railroads, representing the Boston & Maine RR, zoning business in Nashua, in said county" as defendant. In his brief statement, defendant stated he was not Dir Gen'l of RR at the time the action accrued (10/1/17). Motion to dismiss granted. Upheld on appeal. There was no error in denying the motion to amend by joining B&M railroad as defendant.

When a new defendant is brought in by amendment, the situation as to his rights and liabilities is what it would be if an original action against him were brought at that time. As to him, this is the beginning of the suit. At the time when the present motion to amend was made the cause of action against the railroad had expired. The accident happened in October 1917, and the motion was made in March, 1922. The situation presented by the motion was that of a plaintiff who asked leave to institute a suit which it conclusively appeared could not be maintained. Upon this application the court made the only sustainable ruling. It could not be found that justice required so useless a proceeding as giving permission to a plaintiff to institute a suit which must at once be dismissed." *See Bonnie and Sharfova* (below) - interpreting *Lewis* and explaining that the key issue is whether the "new" defendant received timely actual notice of the lawsuit.

Remick v. Spaulding, 82 NH 182 (1926). Personal injury claim against J. Spaulding & Sons, a partnership. At trial, it appeared that the company was a corporation - J. Spaulding & Sons, Inc. The Superior Court allowed plaintiff to amend the name of the corporation. "It is the general rule that the court may allow amendments in civil actions 'by adding new parties or by substituting new ones for original parties, if justice requires the change to be made.'" When viewed in light of the circumstances of this case, "it was hardly more than the correction of an unimportant misnomer."

Brown v. Brockway, 87 N.H. 24 (1935). "The statute requires the leave of court to further prosecute an action pending against a defendant who has died and whose estate is administered in the insolvent course. The plaintiff disclaims any right to satisfy from the decedent's estate any judgment he may obtain, and he depends wholly upon the sheriff's bond for satisfaction. He cannot bring suit upon the bond except upon a judgment as the cause of action. In this situation as matter of law the plaintiff is entitled as against the defendant to receive leave for proceeding with his action. It is too late to make the sheriff a party to the action, but the bond is security for the wrongs of his deputies as well as for his own. Since recovery upon the bond is ultimately sought, the obligors thereon are entitled to notice and an opportunity to appear and defend the action before leave to prosecute it further is granted. The statute of limitations did not bar the amendment. **Amendments of substance may be permitted "in any stage of the proceedings." They have retroactive effect so far as justice requires.** The action was brought within the prescribed time, and when brought it became amendable at any time during its pendency."

Whitney v. H.P. Hood, 88 NH 483 (1937). Declaration amended to allow negligence theory after statute of limitation expired. "Amendments of substance are to be allowed at any stage of litigation when necessary to prevent injustice, and although they have retroactive effect."

Edgewood Civic Club v. Blaisdell, 95 NH 244 (1948). Petition to set aside a zoning amendment was presented by taxpayer. After defendant moved to dismiss because plaintiff was not a duly authorized taxpayer, petition was amended to substitute 40 individual members of the club as parties plaintiff. **"The court allowed the amendment effective as of the date of the original petition was filed. This was proper and within the discretion of the Superior Court even though it was retroactive and the thirty day period for appeal had expired."**

Roy v. Roy, 101 NH 88 (1957). Guest in a car sued host motorist after collision. The accident occurred on November 30, 1940. The writ was dated December 19, 1940. Due to military service of the parties, the case did not get to trial until 1956 when the named plaintiff (Thomas Roy) was substituted for his son (Oscar) who was injured in the collision. No abuse of discretion in allowing the substitution. **"It is generally held that where an action was brought by a nominal plaintiff or one suing for the use of another, an amendment of the complaint after the Statute of Limitation has run, by substituting the real party in interest as plaintiff where he is the one having the right of action or where the action could have been brought in his name as well as in that of the nominal plaintiff, relates back to the commencement of the action."**

Dupuis v. Smith Properties, 114 NH 625 (1974). Personal injury action for injuries resulting from gas explosion. At the pretrial conference, plaintiff learned that the corporate defendant had not been correctly named. Superior Court denied the motion to amend to correct this defect; the statute of limitation had expired by the time the motion was filed. Reversed on appeal. Misnomer, mistaken identity, misdescription — "Correction of misdescription is generally permitted by way of amendment but substitution of a new party is not." **"The rationale of the statute of limitations, which is to insure that defendants receive timely notice of actions against them is not applicable in a case such as this one where the defendant actually received notice within the limitation period."**

Thomas v. Telegraph, 151 NH 145 (2004). The *pro se* plaintiff in *Thomas* filed an action alleging "defamation-libel and slander." Later, the plaintiff filed a motion to amend to add a count for "invasion of privacy – false light" count. Two defendants moved to dismiss case on personal jurisdiction grounds, and defendants objected to the motion to add the new count. The trial court denied both motions; the two issues were appealed to the Supreme Court which affirmed. On the amendment issue, the Supreme Court deferred to the Superior Court's discretion, rejecting the invasion of privacy count because (1) it was an entirely new cause of action; (2) the statute of limitations had run; and (3) the defendants would be substantially prejudiced. "What is relevant is that invasion of privacy is a new cause of action; as such, absent a showing of injustice, it was within the trial court's discretion to deny the plaintiff's motion to amend his writ," and "to allow the plaintiff to amend his writ after the statute of limitations had run would unfairly prejudice the defendants."

Thomas strikes me as an unusual decision. I have always hoped that it has limited precedential value for a few reasons. First, the plaintiff in the case was pro se. My guess is that Judge Groff ran out of patience, and decided enough was enough when the plaintiff introduced a new theory after the statute of limitation expired. Second, the new theory (false light invasion of privacy) has not been expressly adopted in this jurisdiction.

Perhaps most troubling is the notion that the defense was somehow prejudiced by the introduction of an invasion of privacy claim. It is difficult to think of how discovery would have gone differently if that claim had been plead early in the case. And where the case was reviewed on appeal and remanded for further proceedings, there was ample opportunity for additional discovery, if any was needed. But beyond that, there is not much difference in the proof required to make out a claim for defamation and the proof required for invasion of privacy.

My sense of the opinion is that it is more a practical resolution of an appeal, showing deference to the trial judge, rather than a decision that holds strictly to any compelling technical analysis.

Bonnie v. Beaulieu-Lindquist Real Estate, 2007 WL 9619440 (2007). Superior Court order denying leave to substitute named defendant, and granting defense motion for summary judgment after statute of limitation expired. Vacated and remanded. Discussion of *Lewis v. Hines* and *Dupuis v. Smith Properties*. The "crucial issue" is whether the party to be substituted (DEAL, LLC) "had actual notice of the plaintiffs' lawsuit." The trial court's order was therefore vacated, and the case remanded "for the trial court to consider whether, where one member of a limited liability company had actual notice of a lawsuit, notice may be imputed to the company itself."

Sharifova v. Riley, 2012 WL 12830668 (2012). Superior Court order denying leave to substitute named defendant, and granting defense motion for summary judgment after statute of limitation expired. Vacated and remanded. The "crucial issue in determining whether to allow the plaintiffs to amend their writ is whether Katherine had actual notice of the lawsuit." Vacated and remanded.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

General Linen Service, Inc.

v.

General Linen Service Co.

Civil No. 12-cv-111-LM
Opinion No. 2015 DNH 021

O R D E R

General Linen Service, Inc. ("GL Newburyport" or "GL-N") has sued its competitor, General Linen Service Co. ("GL Somersworth" or "GL-S"), under a variety of federal and state legal theories. Before the court is GL Newburyport's motion to amend its complaint to add five new defendants. GL Somersworth objects. For the reasons that follow, plaintiff's motion to amend is denied.

I. Background

The following facts are drawn from plaintiff's first amended complaint, document no. 26, which is the operative complaint in this case. GL Newburyport and GL Somersworth are competitors in the business of providing linens to commercial customers. GL-N provides services to its customers pursuant to contracts with them. It maintains customer information in digital format, as does GL Somersworth, and both companies use the same software vendor. In addition, GL-N allows its customers to access their accounts and transact business on-line, through a "web portal."

In April of 2010, one of GL Newburyport's customers, Hart House, reported to GL-N that it had received a sales pitch from a GL Somersworth representative who, during the course of his presentation, provided Hart House with a package of GL-N's invoices. GL-N then deduced that the GL-S representative could only have gotten GL-N receipts through the GL-N web portal. Through its software vendor, GL-N learned that its web portal had been accessed on several occasions by an unfamiliar username. GL-N's general manager traced that username to an IP address registered to GL-S. As a result of GL-S's use of GL-N's pricing information to solicit business, GL-N lost several customers entirely and was forced to lower the rates it charged several other customers.

This action followed. In its original complaint, filed on March 23, 2012, GL Newburyport asserted claims against GL Somersworth under the federal Computer Fraud and Abuse Act, New Hampshire's Consumer Protection Act, New Hampshire's Trade Secret Act, and New Hampshire common law.[1] GL-S was the only entity named as a defendant in GL-N's original complaint.

II. Discussion

In its motion to amend, GL Newburyport states that, based

[1] GL Somersworth, in turn, asserts counterclaims arising under the federal Lanham Act, the New Hampshire Consumer Protection Act, and New Hampshire common law.

upon its examination of GL Somersworth's interrogatory answers, it has, "for the first time, identified [five] individuals who, upon information and belief, appear to have personally participated" in the conduct that underlies its claims. Mot. to Amend (doc. no. 34) 2. The purpose of GL-N's motion to amend is to add those five individuals, four GL-S employees and one former GL-S employee, as party defendants. See id. at 3. As noted, GL-S objects to GL-N's motion to amend.

Under the circumstances of this case, plaintiff needs either defendant's consent, which is not forthcoming, or leave of the court to amend its complaint. See Fed. R. Civ. P. 15(a)(2). "The court should freely give leave [to amend] when justice so requires." Id. Defendant, however, argues that the court should not grant leave because plaintiff: (1) filed its amended complaint after the limitation period on its claims had run; and (2) is not entitled to relief under the rules governing relation back. The court agrees.

It is undisputed that the limitation period had run on claims arising from GL Somersworth's alleged intrusion into GL Newburyport's electronic data by the time GL-N filed the motion to amend that is now before the court. Claims asserted in an amended complaint that is filed outside the limitation period are "time-barred as a matter of law unless the amended complaint 'relates back' to the original complaint." Coons v. Indus.

Knife Co., 620 F.3d 38, 42 (1st Cir. 2010). "Under the doctrine of relation back, an amended complaint can be treated, for purposes of the statute of limitations, as having been filed on the date of the original complaint." Id. at 42 n.4 (quoting Pessotti v. Eagle Mfg. Co., 946 F.2d 974, 975 (1st Cir. 1991)).

With regard to the mechanics of relation back, the Federal Rules of Civil Procedure provide, in pertinent part:

> **(1)** ***When an Amendment Relates Back.*** An amendment to a pleading relates back to the date of the original pleading when:
>
> **(A)** the law that provides the applicable statute of limitations allows relation back;
>
> **(B)** the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading; or
>
> **(C)** the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> **(i)** received such notice of the action that it will not be prejudiced in defending on the merits; and
>
> **(ii)** knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

Fed. R. Civ. P. 15(c). A plaintiff who seeks to add a new defendant may rely upon either Rule 15(c)(1)(A) or Rule 15(c)(1)(C). See Coons, 620 F.3d at 42; see also 3 James Wm.

Moore, Moore's Federal Practice § 15.19[2] (3d ed. 2014). GL Newburyport relies exclusively on Rule 15(c)(1)(C).

The plaintiff "bears the burden of showing that the Rule 15(c) relation back doctrine applies." Kelly v. Dowaliby, No. 13-cv-107-LM, 2014 WL 2605478, at *3 (D.N.H. June 10, 2014) (citing Coons, 620 F.3d at 44; Smith v. Chrysler Corp., 45 F. App'x 326, 2002 WL 1899615, at *1 (5th Cir. 2002)); see also Al-Dahir v. F.B.I., 454 F. App'x 238, 242 (5th Cir. 2011). The precise nature of that burden is not entirely clear. Rule 15(c) issues are often litigated when a defendant moves for summary judgment on grounds that a claim asserted in an amended complaint is time-barred. In those situations, courts look to the record to determine whether the plaintiff has carried its burden of demonstrating that the relation-back doctrine applies. See, e.g., Ham v. Sterling Em'cy Servs. of the Midwest, Inc., 575 F. App'x 610, 617 (6th Cir. 2014); Wilkins v. Montgomery, 751 F.3d 214, 225 (4th Cir. 2014) (rejecting plaintiff's relation-back argument when it had "zero support in the record"). Here, by contrast, Rule 15(c) has arisen in the context of an objection to a proposed amendment, so there is no summary-judgment record to which the court can turn. On the other hand, plaintiff has produced several exhibits in support of its motion to amend, and several more in support of its reply to defendants' objection. In any event, because the question

before the court may be resolved on purely legal grounds, there is no need to further characterize the nature of a plaintiff's burden to show that the relation-back doctrine applies.

Rule 15(c)(1)(C) requires GL Newburyport to demonstrate that: (1) its claims against the five individuals it seeks to add as defendants satisfy Rule 15(c)(1)(B) by arising out of the same conduct on which the original complaint is based; (2) within the time limit set by Rule 4(m), those individuals received at least constructive notice of GL-N's claims, and that notice was sufficient to prevent them from being prejudiced by having to defend on the merits; and (3) within the Rule 4(m) time frame, i.e., 120 days from the filing of GL-N's original complaint, the individuals knew or should have known that GL-N would have brought an action against them, if it had not made a mistake concerning their identities. See Coons, 620 F.3d at 42.

GL Newburyport has made the first showing. Its proposed claims against the five current or former GL Somersworth employees arise from unauthorized access to its digital data. That is also the factual basis for GL-N's original claims against GL-S. For the purpose of the analysis that follows, the court will assume that GL-N has made the second requisite showing, regarding the individuals' notice of its claims. GL-N, however, has not carried its burden of showing that, within the Rule 4(m) time frame, those individuals knew or should have

known that GL-N would have named them as defendants "but for a mistake concerning the [their] identit[ies]," Fed. R. Civ. P. 15(c)(1)(C)(ii) (emphasis added). The problem is that GL-N has not identified a mistake concerning the individuals' identities of the kind that is cognizable under Rule 15(c)(1)(C)(ii).

GL Newburyport's motion is based upon assertions that: (1) in interrogatory answers and documents produced by GL-Somersworth in August and September of 2014, GL-S identified, for the first time, individuals who allegedly participated in the conduct underlying GL-N's claims; and (2) "[u]ntil it [i.e., GL-N] received these responses from [GL-S], [GL-N] had no way of identifying [GL-S]'s employees who unlawfully obtained and utilized [GL-N]'s customer information to gain a competitive advantage," Pl.'s Mot. to Amend (doc. no. 34) 3.[2]

For the proposition that the foregoing factual scenario describes a mistake, for purposes of Rule 15(c), plaintiff turns to the Supreme Court's decision in Krupski v. Costa Crociere S. p. A., 560 U.S. 538 (2010). In that case, the issue before the court was whether a plaintiff's knowledge of the existence of a potential but unnamed defendant, at the time it filed its original complaint, precluded the plaintiff from demonstrating a

[2] GL-N makes a similar assertion in its reply brief: "Despite diligent best efforts, it was not until September 2, 2014 that the identities of these five (5) individuals were disclosed in a manner that enabled GL Newburyport to finally discern culpability." Pl.'s Reply (doc. no. 42) 2.

mistake that satisfies Rule 15(c). The Court held that the determinative issue is not the plaintiff's knowledge, but, rather, the potential defendant's. And then the court explained:

> That a plaintiff knows of a party's existence does not preclude her from making a mistake with respect to that party's identity. A plaintiff may know that a prospective defendant — call him party A — exists, while erroneously believing him to have the status of party B. Similarly, a plaintiff may know generally what party A does while misunderstanding the roles that party A and party B played in the "conduct, transaction, or occurrence" giving rise to her claim. If the plaintiff sues party B instead of party A under these circumstances, she has made a "mistake concerning the proper party's identity" notwithstanding her knowledge of the existence of both parties. The only question under Rule 15(c)(1)(C)(ii), then, is whether party A knew or should have known that, absent some mistake, the action would have been brought against him.

Id. at 549. In reliance upon Krupski, GL Newburyport makes the following argument:

> In this case, there is no question: GL Newburyport misunderstood the roles that the Added Defendants [i.e., the five individuals] played in the 'conduct, transaction, or occurrence' that is the subject of the Amended Complaint. GL Newburyport knew that GL Somersworth had undertaken illegal action to obtain confidential information, but it did not have knowledge regarding the individual actions and personal liability associated with GL Somersworth's behavior.

Pl.'s Mot. to Amend. (doc. no. 34) at 6. The gist of GL Newburyport's argument is not that it erroneously sued party A when it knew about, and should have sued, party B; GL-N's

argument is that it sued party A because it did know about party B until after the limitation period had run.

GL Newburyport's reliance upon Krupski misplaced, because the legal issue resolved in that case is not present in this case. More importantly, however, lack of knowledge is not a mistake for the purpose of relation back. As Judge Stahl has explained:

> Rule 15(c)(3) [the virtually identical predecessor to Rule 15(c)(1)(C)(ii), see Krupski, 560 U.S. at 552 n.4] permits an amendment to relate back only where there has been an error made concerning the identity of the proper party . . . but it does not permit relation back where, as here, there is a lack of knowledge of the proper party.

Wilson v. U.S. Gov't, 23 F.3d 559, 563 (1st Cir. 1994) (quoting Worthington v. Wilson, 8 F.3d 1253, 1256 (7th Cir. 1993)) (internal quotation marks omitted, emphasis supplied by Wilson). Judge Stahl continued:

> In this case, there was no "mistake concerning the identity of the proper party," as required by Rule 15(c)(3). Rather, Wilson merely lacked knowledge of the proper party. In other words, Wilson fully intended to sue GEGS, he did so, and GEGS turned out to be the wrong party. We have no doubt that Rule 15(c) is not designed to remedy such mistakes.

Id. The decision in Wilson is in accord with more recent decisions from other circuits. See, e.g., Moore v. Tenn., 267 F. App'x 450, 455 (6th Cir. 2008) ("[A] plaintiff's lack of knowledge pertaining to an intended defendant's identity does not constitute a 'mistake concerning the party's identity'

within the meaning of Rule 15(c).") (citation omitted); Joseph v. Elan Motorsports Techs. Racing Corp., 638 F.3d 555, 558 (7th Cir. 2011) ("A failure to identify the proper party is a mistake not about the defendant's name but about who is liable for the plaintiff's injury.").

GL Newburyport argues that, as a result of Krupski, Wilson is no longer good law. The court must disagree. Krupski says nothing to undermine the rule that lack of knowledge of a possible defendant is not a mistake for the purpose of applying the relation-back doctrine. To the contrary, Krupski addresses the situation in which a plaintiff knows about two or more possible defendants and misunderstands their roles in the conduct underlying the plaintiff's suit. As Judge Castel has explained when presented with a similar argument:

> The situation addressed by the Court in Krupski is not that faced here, nor is it the situation addressed by the Second Circuit in Barrow [v. Wethersfield, 66 F.3d 466, 470 (2d Cir. 1995) ("We are compelled to agree with our sister circuits [including the First] that Rule 15(c) does not allow an amended complaint adding new defendants to relate back if the newly-added defendants were not named originally because the plaintiff did not know their identities.")]. Unlike Krupski, the plaintiff here did not harbor a misimpression as to known parties' identities. Rather, the plaintiff did not know the identities of officers Suarez and Nozelle until after the statute of limitations had run. The plaintiff here, unlike the plaintiff in Krupski, did not have the requisite information to sue the correct party. Therefore, on these facts, Krupski does not control and Barrow should apply to bar plaintiff's proposed amendment.

Rodriguez v. City of N.Y, No. 10 Civ. 1849(PKC), 2011 WL 4344057, at *9 (S.D.N.Y. Sept. 7, 2011) (citing Dominguez v. City of N.Y., No. 10 Civ. 2620(BMC), 2010 WL 3419677, *2-3 (E.D.N.Y. Aug. 27, 2010) (finding that Krupski does not overturn or limit Barrow, but rather "merely picks up where Barrow left off . . . [t]herefore, Barrow's holding that a lack of knowledge is not a mistake is still intact"); Daniel v. City of Matteson, No. 09-cv-3171, 2011 WL 198132, *4 (N.D. Ill. Jan. 18, 2011) (concluding that even after Krupski, "[l]ack of knowledge as to the identity of the proper defendant is not a mistake"); Wilson v. Delta Airlines, Inc., No. 2:09-cv-2687-JPM-dkv, 2010 WL 2836326, *4 (W.D. Tenn. July 19, 2010) (concluding that Sixth Circuit precedent holding that lack of knowledge does not constitute a mistake within the meaning of Rule 15(c) remains applicable after Krupski); Burdine v. Kaiser, No. 3:09CV1026, 2010 WL 2606257, *2 n.2 (N.D. Ohio June 25, 2010) (finding same).

Regarding the rationale for the rule stated in Wilson, Moore, Joseph, and Rodriguez, the court turns to Hall v. Norfolk Southern Railway Co., which includes the following passage:

> It is the plaintiff's responsibility to determine the proper party to sue and to do so before the statute of limitations expires. A plaintiff's ignorance or misunderstanding about who is liable for his injury is not a "mistake" as to the defendant's "identity."

469 F.3d 590, 596 (7th Cir. 2006). That statement from Hall, in turn, puts to rest any argument by GL Newburyport that it is entitled to relation back due to a purported failure of disclosure by GL Somersworth. It was not GL-S's obligation to identify other defendants for GL-N; it was GL-N's obligation to figure out who to sue.

GL Newburyport's motion to amend is based upon nothing more than its admitted ignorance of the five individuals' identities. Thus, it has not carried its burden of demonstrating that it made a mistake concerning the identities of those possible defendants. Absent a mistake concerning those identities, GL Somersworth is entitled to denial of GL Newburyport's motion to amend.

III. Conclusion

For the reasons described above, plaintiff's motion to amend, document no. 34, is denied. Accordingly, this case is limited to GL Newburyport's four claims against GL Somersworth and GL Somersworth's counterclaims.

SO ORDERED.

Landya McCafferty
United States District Judge

February 4, 2015

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